IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1578

LOUIS L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

v.

JOHN SYKES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 528 F.2d 522.

JURISDICTION

The judgment of the Court of Appeals was entered February 25, 1976 (A. 19-20). The Fifth Circuit denied

a timely Petition for Rehearing En Banc on March 22, 1976 (A. 21-22). The Petition for Writ of Certiorari was filed on April 28, 1976, and was granted on October 12, 1976. The Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States (A. 50).

Amendment XIV, Constitution of the United States (A. 50).

STATUTE INVOLVED

Title 28 U.S.C. §2254(a)(b) (A. 49).

FLORIDA COURT RULE INVOLVED

PRE-TRIAL MOTIONS RULE 3.190 (1972)

(i) Motion to Suppress a Confession or Admission Illegally Obtained.

(1) Grounds. Upon motion of the defendant or upon its own motion, the Court shall suppress any confession or admission obtained illegally from the defendant.

(2) Time for Filing. The Motion to Suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) Hearing. The Court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

FEDERAL COURT RULE INVOLVED

Rules 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure provide:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * *

(3) Motions to suppress evidence;

* * *

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the Court pursuant to subdivision (c), or prior to any extension thereof made by the Court, shall constitute waiver thereof, but the Court for cause shown may grant relief from the waiver.

QUESTIONS PRESENTED

1. WHETHER A DEFENDANT IS BARRED, BY THE THEORY OF "PROCEDURAL DEFAULT," FROM CHALLENGING, IN A FEDERAL HABEAS CORPUS PROCEEDING BROUGHT UNDER 28 U.S.C. §2254, THE FAILURE OF THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF A POST-ARREST STATEMENT MADE BY THE

DEFENDANT AS A PREREQUISITE TO ADMISSIBILITY, WHEN THE RECORD FAILS TO INDICATE A KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT, AND WHEN THE TOTALITY OF CIRCUMSTANCES SUGGESTS THAT THE STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*, NOTWITHSTANDING THE FAILURE OF DEFENSE COUNSEL TO RAISE THE ISSUE OF VOLUNTARINESS IN THE TRIAL COURT. (Presented in the Petitioner's Brief and in the Amicus Curiae Brief)

2. WHETHER *JACKSON V. DENNO*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED. (Presented in the Petitioner's Brief)

STATEMENT OF COUNSEL

Since there is a Brief on behalf of the Petitioner and one on behalf of the United States in the form of an Amicus Curiae Brief, Counsel for the Respondent shall combine his response to these two briefs in one brief only. Counsel for Respondent has been Court appointed in the United States District Court, in the United States Circuit Court of Appeals for the Fifth Circuit and in this Honorable Court. Counsel for Respondent was not trial Counsel and did not represent Respondent in any State actions or proceedings.

STATEMENT OF CASE

1. On January 18, 1972, an Information was filed by the State Attorney for the Twelfth Judicial District of

Florida in DeSoto County charging JOHN SYKES, the respondent herein, with second degree murder, in violation of F.S.A. 782.04. Specifically, the Information alleged that on January 8, 1972, respondent "did unlawfully kill WILLIE GILBERT by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, by unlawfully making an assault on the said WILLIE GILBERT with a deadly weapon* * *."

Trial commenced on June 5, 1972. At the jury trial, SYKES was found guilty of third degree murder and was sentenced to a term of ten years in the state prison (A. 24).

During the trial, certain statements made by SYKES were introduced into evidence without any evidence in the record (TR. 16-19; 23; 33; 35-37; 47 and 54) that SYKES was advised of his rights as set forth in *Miranda v. Arizona*; or if he was so advised, he was improperly advised. Furthermore, that he was intoxicated or drunk at the time of questioning (TR. 19; 24; 28; 38; 39; 48; 52; 55 and 59) and if he hadn't been arrested for murder, he would have been arrested for drunkenness (TR. 39).

There was no hearing before the Court regarding the voluntariness of any statements, or whether or not the defendant intelligently and knowingly waived his Constitutional rights since the evidence indicates that he was intoxicated and drunk.

The transcript indicates that SKINNER put the defendant under arrest and then, without advising him of his rights, the defendant made a statement (TR. 45). Later, at the jailhouse, defendant was questioned again and this time read his rights from a card (TR. 54-55) while he was under the influence of alcohol (TR. 48; 52

and 55). Other evidence to indicate that defendant could not knowingly and intelligently waive his rights appears in the transcript as to his drinking (TR. 19 and 24), that he was drunk (TR. 38 and 39), and that he was intoxicated (TR. 59).

All other portions of the transcript are immaterial to the points raised here by the Petitioner and by the United States in its Amicus Curiae Brief.

On June 5, 1972, after his Motion to Set Aside Verdict, Arrest Judgment and Obtain a New Trial, all of which were denied, respondent was sentenced to a term of ten years. His direct appeal to the Second District Court of Appeals of Florida resulted in a per curiam affirmance of his trial court judgment and sentence (A. 6). Following this, the defendant filed a Motion To Vacate (A. 24; 40-41) in the trial court, Petitions for Writ of Habeas Corpus in the Florida District Court of Appeals and the Supreme Court of Florida (A. 24; 40-41) all of which were denied. The Petition for Writ of Habeas Corpus in the Florida Second District Court of Appeals resulted in a per curian. opinion at 275 So.2d 24 (1973).

On April 25, 1973, Petitioner, from prison, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida (A. 35-37).

The District Court granted an evidentiary hearing and subsequently rendered a detailed written opinion (A. 23-31) ordering a hearing in State Court regarding voluntariness issue.

Following this, Petitioner filed a Petition for Order Amending the Court's Order of January 23, 1975 (A. 32) to allow the Petitioner herein to appeal to the United States Circuit Court of Appeals for the Fifth Circuit. The case was not certified by the Federal District Court, but rather an Order was entered staying the previous order to allow an appeal by Petitioner.

In an excellent logical opinion, the Court of Appeals affirmed the District Court opinion and ordered (A. 1-18) and directed the State to conduct a hearing within 90 days in the same manner set forth by the District Court.

Following this, the Petitioner proceeded in this certiorari action.

SUMMARY

Several matters are completely overlooked in the briefs before this Honorable Court as regards Florida Criminal Rule of Procedure 3.190 (1972) (A. 51), to-wit:

1. Upon motion of the defendant *or by motion of the Court, any* confession or admission obtained illegally from the defendant *shall* be suppressed.

2. Motions to suppress shall be considered prior to trial *unless opportunity did not exist* or defendant was unaware of grounds; *but* the Court may entertain the motion *or* an appropriate objection at trial.

It is obvious that the Florida Rule regarding the admissibility of an illegal confession or admission is geared to comply with the existing law; i.e. that a fundamental constitutional right under the Fifth Amendment will not be presented to a jury in a way to forge an unfair trial for anyone. The Rule provides that either on a motion of the defendant *or the judge*, an improper admission will be suppressed. Furthermore, the Rule sets forth that the motion shall be made before trial *unless opportunity did not exist. However*, the Court may entertain either the motion of the defendant *or the motion of the judge at the trial.* It must be noted that this rule safeguards the admission of illegal confessions which would result in an unfair

prejudicial trial. This Rule is in harmony with Florida case law.

Now, if a look is taken of the Federal Rule ((Rule 12(b)(3) and 12(f)) cited in the Amicus Curiae Brief, it is noted, as follows:

1. This Rule applied to all evidence whereas Florida Rule 3.190(i) applies specifically to confessions and admissions.

2. In Rule 12(b), the word "*may*" is used throughout the Rule rather than "shall," which indicates something less than mandatory.

3. Motions to suppress evidence (not necessarily confessions) *must* be raised prior to trial.

4. There is no provision in the Federal Rule, as there is in the Florida Rule, for the judge on his motion to hold a hearing.

5. The Federal Rule actually states that failure to timely bring forth the matter prior to trial results in a "waiver." The Florida Rule does not even imply such a penalty.

6. However, "for cause shown" the Court "may grant relief from the waiver."

A study of the Florida Rule (A. 51) makes it clear that either the defendant *or the Court* shall make a motion, before trial if possible, to suppress an illegal confession or admission, but at any rate, to protect this substantive right, the Court may entertain the motion *at trial* – either the defendant's motion *or the Court's motion.* There is nothing in the Rule about waiving anything by procedural default. In fact, the Florida Rule, if properly applied would avoid any possibility of a procedural default since the defendant or the Court would make a motion.

The Amicus Curiae Brief of the United States really only turns on one subject – procedural default.

The Petitioner's Brief deals with only two issues:

1. Waiver of and foreclosure of the defendant's right to federal habeas corpus relief and a resultant denial of a fundamental constitutional right due to this failure to object to the admittance of the illegal confession or admission prior to trial or at trial. The Petitioner argues that this failure to object to an intrusion of a basic substantive right prevents federal relief under the precepts of *Davis v. United States.*

2. Defendant's failure to challenge the admittedly unconstitutional entry of a confession prior to or at trial denies a *Jackson v. Denno* hearing which was ordered by the Federal District Court and by the Court of Appeals in this case.

Through the myriad of case law and as well-reasoned by the Order of the District Court and the opinion of the Court of Appeals, it is clear that a fundamental Constitutional right is zealously protected by the Courts of our land for each citizen. Before a confession or admission will be presented to a jury, there must be a Court-determined hearing as to the voluntariness and legality of the confession or admission. Without a precise showing of tactics or strategy that is knowingly and intelligently waived and entered into with the defendant, the failure to object to the entry of an illegal confession will not result in the denial of a fundamental right and will not be deemed waived by procedural default or otherwise.

If the state trial Court allows an illegal confession or admission to come before the jury as evidence, through a lack of the defendant knowingly and intelligently waiving the rights guaranteed on December 15, 1791, the Constitution is flaunted and the federal courts will listen to the person aggrieved and allow relief through federal habeas corpus with a resultant hearing in a State Court that should have been held in the first place.

Davis v. United States is pointed out strenuously by the United States in its Brief, but as pointed out previously, the Federal Rule 12 states specifically that unless a complaint is raised early that a *waiver* exists. The Florida Rule 3.190(i) is totally different and makes no pretext regarding a *waiver*.

Nonetheless, the Court of Appeals stated that in the *Davis* case no prejudice was shown, but that in this case, admission as evidence of a confession or admission unless voluntariness is shown is a fundamental right and violation is inherently prejudicial.

ARGUMENT

I.

WHETHER A DEFENDANT IS BARRED, BY THE THEORY OF "PROCEDURAL DEFAULT," FROM CHALLENGING, IN A FEDERAL HABEAS CORPUS PROCEEDING BROUGHT UNDER 28 U.S.C. §2254, THE FAILURE OF THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF A POST-ARREST STATEMENT MADE BY THE DEFENDANT AS A PREREQUISITE TO ADMISSIBILITY, WHEN THE RECORD FAILS TO INDICATE A KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT, AND WHEN THE TOTALITY OF CIRCUMSTANCES SUGGESTS THAT THE STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*, NOTWITHSTANDING THE FAILURE OF DEFENSE COUNSEL TO RAISE THE ISSUE OF VOLUNTARINESS IN THE TRIAL COURT. (Presented in the Petitioner's Brief and in the Amicus Curiae Brief)

A. The Florida Court Rule

The Brief of the Petitioner and Amicus Curiae contend that a "procedural default" arises when the defendant fails to challenge the admissibility of a confession or admission before or at trial resulting in waiver of the defendant's fundamental right. This contention is based on Florida Rule of Criminal Procedure 3.190(i).

First of all, in Florida Rule of Criminal Procedure 3.190(i), it is obvious that the Florida Rule regarding the admissibility of an illegal confession or admission is geared to comply with the existing law; i.e. that a fundamental constitutional right under the Fifth Amendment will not be presented to a jury in a way to forge an unfair trial for anyone. The Rule provides that either on a motion of the defendant *or the judge*, an improper admission will be suppressed. Furthermore, the Rule sets forth that the motion shall be made before trial *unless opportunity did not exist. However*, the Court may entertain either the motion of the defendant *or the motion of the judge at the trial.* It must be noted that this rule safeguards the admission of illegal confessions which would result in an unfair prejudicial trial. This Rule is in harmony with Florida case law.

A study of the Florida Rule (A. 51) makes it clear that either the defendant *or the Court* shall make a motion, before trial if possible, to suppress an illegal confession or admission, but at any rate, to protect this substantive right, the Court may entertain the motion *at trial* – either the defendant's motion *or the Court's motion.* There is nothing in the Rule about waiving anything by procedural default. In fact, the Florida Rule, if properly applied would avoid any possibility of a procedural default since the defendant or the Court would make a motion.

As a result, the Florida Rule regarding confessions and admissions guarantees a Florida defendant that there will be no procedural default.

Petitioner's argument is predicated upon the concept of "procedural default." This phrase appears four times in the "Index" to the Amicus Curiae Brief, and the body of the Brief contains several variations on this same theme. The crux of the argument is that JOHN SYKES was forever barred from asserting his Fifth Amendment right to be protected from compulsory self-incrimination, when he failed to object to the voluntariness of post-arrest statements prior to his trial on a charge of second-degree murder. The argument relies on Florida Rule of Criminal Procedure 3.190(i) and cases from jurisdictions outside the State of Florida for support. The argument fails, however, for three reasons:

1. the language of Florida Rule of Criminal Procedure 3.190(i) places a responsibility on the State and the trial judge, which is co-extensive with the responsibility on the defendant, to determine the voluntariness of inculpatory statements as a prerequisite to their admissibility;

2. this Rule of Criminal Procedure is an embodiment and extension of earlier Florida case law which mandated a determination of voluntariness at trial for almost 60 years, and which accords with federal constitutional principles as set forth in *Jackson v. Denno* and *Miranda v. Arizona*;

3. the argument reasons to an absurdly false conclusion: that a defendant is entitled to federal constitutional rights only if he "mentions" them prior to trial, after which time the defendant is deemed to have "waived" his substantive due process rights by simple inaction.

The wording of Florida Rule of Criminal Procedure 3.190(i) is in the disjunctive. It reads: "upon motion of

defendant *or upon its own motion*, the Court shall suppress any confession or admission obtained illegally from the defendant." (Emphasis added) The Rule contemplates a two-pronged responsibility: upon the defendant to apply for an order suppressing an involuntary confession; and upon the Court to make such a determination if admission-type evidence is offered against the defendant. Obviously, the Rule also contemplates that the determination of voluntariness must be made at trial: first, because a defendant may not be aware that such evidence will be offered against him until trial, even if he is aware of the fact of a prior inculpatory statement; and second, because the first opportunity the Court has to make such a determination, absent a pre-trial Motion to Suppress, is at trial of the case. Subsection (2) of the Rule underscores this interpretation, by providing that the Motion to Suppress (i.e., from the defendant *or* from the Court *ex mero motu*) may be made *at trial or even subsequently*, where "opportunity therefor did not exist *or* the defendant was not aware of the grounds for the motion *or* an appropriate objection at trial." The remainder of the Rule requires the Court to hold a hearing on the facts necessary to decide the issue of voluntariness.

Florida case law and trial practice since 1919, has been consistent in requiring such a procedure, as an absolute prerequisite to admissibility of inculpatory statements. Contrary to the assertion of the Amicus Curiae on page 12 of its Brief, *all* of the cases cited by the Fifth Circuit Court of Appeals have as their "common thread" the unwavering principle that *the burden of securing the determination that a confession was freely and voluntarily given falls initially on the State and then, absent such a predicate, on the trial judge, before the confession may be introduced against the defendant.* In *Stiner v. State*, 78 Fla. 647, 83 So. 565 (1919):

> the failure of defense counsel to object does not relieve the trial judge of the duty. . .to satisfy himself that the admissions were freely and voluntarily made. . . .

The logical conclusion of the Amicus Curiae argument is that a defendant must *insist, affirmatively*, on his right to free speech, to be free from invasion of privacy, to receive a fair and impartial trial, and to have obviously tainted statements excluded from the jury's consideration. Federal case law has uniformly held that the entitlement of a defendant to constitutionally-guaranteed rights *does not* depend on the defendant, but the protection of said guarantees is the primary responsibility of the courts and the judicial system.

The Amicus Brief attempts to convince this Court that Rule 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure should apply to the defendant. In *Young v. State*, Florida, 140 So.2d 97, the Court held that a federal rule governing the admissibility of confessions had never been approved by the Courts of Florida and further stated:

> The rule in Florida requires that a judicial confession be proferred to the trial judge and in the absence of the jury to determine whether or not it was freely and voluntarily made.

B. Failure of Defendant to Object Is Not an Automatic Waiver of Fundamental Rights.

It would appear by the briefs that if a defendant fails to object or challenge an illegal confession or an admission that has come into evidence without its voluntariness being established, he has forever waived a basic substantial, fundamental constitutional right. This is not so!

In a habeas corpus proceeding by a state prisoner seeking relief from custody, the Federal District Court is concerned only with the question of whether or not the defendant has been deprived of any right guaranteed to him under the Constitution and laws of the United States. *Stewart v. Stephens*, 244 F. Supp. 982 (1965). The Court further stated that jurisdiction is *not* affected by *procedural defaults* incurred by Petitioner during State Court proceedings except in rare cases. The rare cases being when the Defendant, after consultation with counsel, has *understandingly* and *knowingly* bypassed the privilege and it appears so in the record.

In Florida, if a defendant shows that he was denied due process, he may collaterally attack his conviction. *Young v. State*, Florida, 177 So.2d 345; *Marti v. State*, Florida, 1964, 163 So.2d 506. In the *Young* case, the Court held that even when the defendant failed to appeal his conviction, there is no procedural default in failing to appeal. It is not equivalent to an express waiver of a constitutional right and will not preclude collateral attack on an unlawful conviction. *Young v. State*, Florida, 177 So.2d 345; *Merritt v. State*, 165 So.2d 245; *King v. State*, 157 So.2d 440; *Fay v. Noia*, 372 U.S. 391. In other words, failure to object or challenge as well as failure to appeal will not foreclose collateral attack as regards a fundamental right.

There are numerous cases which hold that failure to object at trial to a denial of a fundamental right does not act as a procedural default to estop collateral attack. where fundamental error is involved, it is not necessary for the defendant to have objected at trial to preserve his objection for appellate review. *O'Berry v. Wainwright*, Florida, 300 So.2d 740; *Simpson v. State*, Florida, 1968, 211 So.2d 35. In *Gardner v. State*, Florida, 170 So.2d 461, the Court stated that

> The Courts of this State have jealously defended the privilege of one's constitutional rights not to be forced to testify against himself.

and the Court went on to hold that there was no waiver when the defendant failed to object at trial. The failure to object in *Singleton v. State*, Florida, 183 So.2d 245, did not deny the defendant the right to collateral attack where there was denial of due process.

In *Mullins v. United States*, 382 F.2d 258 (1968), the Court said:

> In *United States v. Inman*, 352 F.2d 954 (4 Cir. 1965), decided more than three months prior to Mullins trial we heeded the Supreme Court's teaching in *Jackson v. Denno*, and laid down specific rules to be followed by the federal courts in this Circuit whenever a confession is proferred by the Government. We pointed out that the procedure must be followed "*even though there was no objection.*" 352 F.2d 956 (Emphasis added)

and then the decision continues on to elaborate on the procedure and what the district judge's finding should include.

When a fundamental right is so violated as to infect the due process of law standard, the violation will be reviewed on appeal even in the absence of objection in the trial Court. *Gordon v. State*, 104 So.2d 524.

Even in one case where counsel in trial stated that there was no question as to the voluntariness of the confession and where on the record the district judge did not make an independent finding that the confession was voluntary before submitting it to the jury, the Court held that a *Jackson v. Denno* hearing was necessary. *Curtis v. United States*, 349 F.2d 718 (1965).

In the Fifth Circuit, it was held in *Randall v. United States*, 454 F.2d 1132 (1972) that

> nevertheless federal courts are not spared the burden of examining the merits of an asserted constitutional error raised in a Section 2255 petition simply because the petitioning federal prisoner failed to assert the error on direct appeal. *Kaufman v. United States*, 394 U.S. 217, 89 S. Ct. 1068 (1969)

No objection to testimony was made at any time in *Proctor v. United States*, 404 F.2d 819 (1968) and yet the United States Court of Appeals for the District of Columbia noticed the matter as an error of substantial rights without procedural default and heard it on appeal. The Court said:

> The record now before us is inadequate to support a finding of *valid waiver* under Miranda. Since *no Miranda objection* was made at trial – we notice the Miranda issue on appeal as a "defect affecting *substantial rights*"... Hence, we now remand the case to the District Court for a hearing to determine whether Proctor made his statement to the arresting officer subject to a valid Miranda waiver.

A Petition for Habeas Corpus from a state prisoner was entertained and the Court held that failure to object, by itself, does not constitute the waiver of the right to a hearing on voluntariness of confession.

Generally, except for fundamental error, all errors must be raised on appeal or those errors are waived. The legal thesis is exemplified in *Burse v. State*, Florida, 1965, 175 So.2d 586, where no appeal was taken and the Court reasoned that there the error is a denial of due process affecting a fair trial that the judgment is subject to collateral attack by petition.

Regarding so called "procedural default," one must look at *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, where the Supreme Court of the United States

sustained a collateral attack even though the Alabama law provided that certain defenses must be announced at arraignment or else be waived. The Supreme Court of the United States revised with a holding that "only the presence of counsel could have enabled the accused to plead intelligently at his arraignment."

It is interesting to note that SYKES in the instant case filed a Motion to Vacate in trial court and a Petition for Writ of Habeas Corpus in both the District Court of Appeal of Florida and the Supreme Court. The District Court of Appeal per curiam decision appears at 275 So.2d 24 (1973) and states as follows:

> This petition for writ of habeas corpus raises questions as to admissibility of a confession which was allowed in the trial court against SYKES. On direct appeal this court affirmed *because* the record amply supported the findings.

It is obvious to anyone that the Court looked at the Petition for Habeas Corpus and compared it with its decision rendered on the direct appeal. It is also clear that the District Court of Appeal said nothing about "procedural default" or "waiver." It follows from the cases cited supra that there can be no procedural default or waiver unless there is a clear and convincing tactical decision appearing on the record as a deliberate bypass. The federal district court, the circuit court and the Florida District Court of Appeal did not find procedural default, waiver, or a bypass.

C. Inherent Fundamental Rights Must Be Protected by the Court at Trial to Prevent Denial of Due Process through an Unfair Trial.

The Florida Criminal Rule 3.190(i) provides that confessions or admissions illegally obtained shall be suppressed by the *Court upon the Court's own motion.*

It further provides that the Court may hear the motion at the trial. This rule is in harmony with the trial practice and procedure in Florida as well as following the case law of almost 60 years ago as set out in *Stiner v. State*, Florida 1919, 83 Southern 565, where the Court stated:

> The question of whether admissions and confessions are made freely or voluntarily *is for the Court* to determine, and, to enable it to do this, there should be preliminary investigation *by the court*, and this examination should be made in the absence of the jury. *Harrold v. Oklahoma*, 196 Fed. 47. . . While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, *that does not relieve the trial judge of the duty* when evidence of this character is sought to be introduced to satisfy himself that the admissions were *freely and voluntarily made before admitting them.* It is a *duty* which the law imposes *upon the court* in order that the prisoner's constitutional right to a *fair and impartial trial* may be protected and preserved, and this *right* should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by respective counsel and won and lost according to their skill in playing the game according to the rules.

This is the law of Florida and Florida Criminal Rule 3.190(i) upholds the teachings of *Stiner v. State.*

The premise that a fair trial is a fundamental due process right and should be protected by the Court regardless of whether or not the defendant's counsel objects is maintained in *Akin v. State*, Florida 1923, 98 Southern 609, where it was held that "it is the duty of the trial judge, whether requested or not, to check

improper remarks of counsel to the jury." The Court said that "if the improper remarks are of such character that either rebuke nor retraction may entirely destroy their sinister influence in such a way a new trial should be awarded regardless of the want of objection or exception." A fair trial by only admitting confessions and admissions which the judge has determined voluntary fall into the same category as the *Akin* case. This same holding appears in *Carlile v. State*, Florida, 1937, 176 Southern 862, where it was determined that whether requested or not, the trial judge has a duty to check improper remarks of counsel. If the Court has this duty with or without objection, surely the trial judge has a duty to guard the fundamental right to see that a confession or admission is proper before it is presented to a jury. The Supreme Court of Florida in reversing the judgment in the *Carlile* case stated

> This Court is reluctant to reverse the judgment of the trial court unless convinced that a fair trial was not given. Such a trial is guaranteed by the fundamental law, and we are confronted at all times with our oath to uphold this mandate.

A Florida Supreme Court case on point is found in *Middleton v. State*, Florida, 1974, 295 So.2d 628, where it was found to be "*patent* fundamental error" which warranted extraordinary writ despite per curiam affirmance by the lower appellate court. It was said that

> because the trial court did not conduct a hearing outside the presence of the trial jury on voluntariness of inculpating statements . . . There should be no glossing over the Petitioner's fundamental rights which has long been recognized in Florida law. A new trial appears in order.

The voluntariness of a confession must be determined *by the trial judge* in the absence of the jury. *Dodd v. State*, Florida, 232 So.2d 235; *Graham v. State*,

Florida, 1956, 91 So.2d 662; *Jackson v. Denno*, 1964, 378 U.S. 368, 84 S. Ct. 1774; *Young v. State*, Florida, 1962, 140 So.2d 97. The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. *McDole v. State*, 283 So.2d 554; *Jackson v. Denno*, supra.

D. The Prosecutor has a Heavy Burden to Demonstrate that any Waivers by a Defendant are made Knowingly and Intelligently.

The state's (prosecutor's) burden of proof in establishing that the Miranda warnings are given, that they were adequate and that waiver was knowing and intelligent is by clear and convincing evidence. *State v. Graham*, Florida, 1970, 240 So.2d 486.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, the Supreme Court said that when a custodial interrogation is undertaken without the presence of an attorney, the State bears a heavy burden to demonstrate that a defendant knowingly and intelligently has waived his right to counsel and his privilege against self-incrimination. Regarding state's burden also see *Reddish v. State*, Florida, 1964, 167 So.2d 858, where the Court held that

> The holdings vary in different jurisdictions. Florida has long adhered to the rule that preliminary to the introduction of an extrajudicial confession it is the State's burden to go forward with the evidence to establish its admissibility. This includes the burden to make a prima facie showing that the confession was voluntarily given. When the State has accomplished this, an accused who denies the voluntariness of the confession must then go forward with evidence to support his position. The

> trial judge then rules on the basis of all the evidence. *Davis v. State*, 105 So. 843; *Nickels v. State*, 106 So. 479; etc. . . .

The prosecution has the burden of proving by a preponderance of the evidence that a confession was freely and voluntarily given. *Lego v. Twomey*, 404 U.S. 447, 92 S. Ct. 619.

The state has a prerequisite to complete before it can introduce a confession. A predicate must be laid. It only seems proper that like many other types of evidence a predicate must be made before the party can enter the evidence. When we are dealing with a right guaranteed by the United States Constitution, there seems to be a mandatory predicate that a confession or admission was freely and voluntarily given and that the right was knowingly and intelligently waived. In *Dodd v. State*, Florida, 1970, 232 So.2d 235, the Court said

> *When the state desires to introduce a confession into evidence*, it has the burden of making a prima facie showing that the confession was the voluntary act of the defendant. *Reddish v. State*, Florida, 1964, 167 So.2d 858; *Young v. State*, Florida, 1962, 140 So.2d 97.

E. There was no Intentional Waiver Resulting in a Deliberate Bypass.

The Petitioner argues here as he did in the United States District Court and in the Circuit Court of Appeals that SYKES intentionally waived his fundamental rights guaranteed by Miranda by failing to object before or at trial and as a result participated in a deliberate bypass. In both the lower court and the federal district court, this argument of the Petitioner was totally and unequivocably denied. Nowhere in the record can such a hypothesis be drawn.

The Supreme Court of the United States has "consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by *anything* that may occur in the state proceedings. State procedural rules must yield to this overriding federal policy." *Fay v. Noia*, 372 U.S. 391. The Court said habeas corpus relief may be cut-off to a defendant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. Here, SYKES, according to the case law thus far cited herein, did not waive his right to review under state law. It has been shown that failure to object or even to appeal an error does not destroy the right to review by direct appeal or by habeas corpus the invasion of a fundamental right – unless, of course, that right was knowingly waived and a deliberate bypass initiated.

Estelle v. Williams, U.S. Supreme Court, No. 74-676, held that a tactical choice will be considered as a deliberate bypass and void any further relief under federal habeas corpus. Here, again, the federal district court and the court of appeals did not find a tactical choice either explicitly or by innuendo.

In *Davis v. United States*, 411 U.S. 223 (1973), it was held that there was procedural default since the defendant failed to raise his complaint timely. The fact that there was no prejudicial harm shown in the record resulted in a denial of relief. *Davis* stands also for the proposition that a procedural default of a fundamental right may be raised later provided there was prejudice to the defendant. In the instant case, as shown in the aforementioned case law, the entry into evidence of a confession or admission with no showing of voluntariness is a fundamental error and prejudice is inherent.

F. Synopsis as to Argument on Point I.

It then "boils down" to this analysis.

First of all, Florida's Rule 3.190(i) is not as restrictive as the Petitioner and Amicus Curiae would have this Court to believe. The Rule provides that should the defendant fail to file a motion and object to an illegally obtained confession or admission, then, *the Court shall* have a hearing on its own motion. The Rule further provides for this to be done *before or at trial.* What the Rule really stands for is the proposition that *all* confessions or admissions before entry as evidence be scrutinized by the Court. How can a confession or admission be determined "illegally obtained" without a Court hearing. The very title of the Rule

> (i) Motion To Suppress a Confession or Admission Illegally Obtained

means precisely that a hearing is mandatory. In a vacuum without investigation through a hearing, no confession could be determined and found "Illegally Obtained." So, the Rule is quite logical when considered

> Upon Motion of the defendant, *or upon its own motion,* the *Court* shall suppress *any* confession or admission obtained illegally from the defendant.

along with the prevailing state law and trial practice as set down in Florida in the case of *Stiner v. State* where it was held that if the defendant does not pursue the matter of seeing that a bad confession or admission is kept from an unfair trial, then the Court has a duty to guard our fundamental rights.

Secondly, the case law, regarding failure to object to such a fundamental subject as a confession or admission, zealously protects the rights of the citizenry. In both collateral attack and on direct appeal, the

courts hold that they both will be heard when a fundamental right is the matter complained of.

Thirdly, it has been pointed out, that the Court must protect erosion of constitutional rights, with or without objection from the defendant. This mandate goes to the very roots of our great love for our freedoms as manifested on December 15, 1791. Case law overwhelmingly indicates that the Court cannot sit and tolerate a violation of anyone's substantive rights.

Fourth and last, evidence generally is never admitted before a jury without the proper predicate having been laid. Then, why, when we are dealing with the Fifth Amendment rights, can the prosecution boldly throw in a confession or admission without the prerequisite predicate having been made for its entry into evidence. A "heavy burden" rests on the state to guarantee this predicate and without it being proper, a confession or admission is improper.

The Miranda case certainly upholds the fact that the "Fifth Amendment is so fundamental to our system of Constitutional rule" that the Court "has always set high standards of proof for the waiver of constitutional rights" and will not tolerate presumptions or innuendos.

Certainly, is it too much to ask that before any confession or admission goes to a jury that it be scrutinized for its legality as evidence? Why does the brief of the Petitioner and Amicus Curiae feel that SYKES in this case should not have been afforded, and now, not granted a mere hearing regarding such a fundamental question? To indulge the Court and prosecution in an hour's time or less to guarantee that a fair trial is afforded an accused – maybe guilty and maybe not guilty, but at least, presumed innocent – is certainly not too much to require in any case.

ARGUMENT

II.

WHETHER *JACKSON V. DENNO*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED. (Presented in the Petitioner's Brief)

The Petitioner begins argument in the brief at II taking issue with the Fifth Circuit Court of Appeals holding that "it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelligent waiver of his constitutional rights." As stated explicitly in I supra of this brief, that is precisely the case law and trial practice in Florida which is harmonious with Florida Rule 3.190(i). It is of significant importance that Florida has now gone even further in this rationale of protecting fundamental rights by its newly adopted Florida Evidence Code which was approved on June 23, 1976, and which will become effective on July 1, 1977. Pertinent portions of the Code are

90.103

> (2) This act shall apply to both civil and criminal actions brought after the effective date of this act. . .

90.104

> (3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, *even though such errors were not brought to the attention of the trial judge.*

Again in this Code, we see *Stiner v. State*, supra, being adhered to and enforced. The Florida Rule 3.190(i) provides the same procedure as does Florida

Evidence Code 90.104(3) to be effective in July. So, here we have the Legislature of the State of Florida codifying the procedure that has existed in Florida for years.

In the Argument under I of this brief, case after case plus Florida Rule 3.190(i) was presented to show that there can be no waiver in a trial in Florida of a substantive right.

Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary *must appear from the record with unmistakable* clarity. *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639.

In the instant case, not only did the state fail to carry its heavy burden in showing affirmatively, on the record, that the statements introduced were voluntarily made, but that the waiver principles enunciated in *Fay v. Noia*, 1963, 372 U.S. 391, 83 S. Ct. 822, make it plain that constitutional rights of such fundamental importance as those considered here may only be waived by the defendant himself, deliberately, and not by his attorney, without his personal knowledge or a procedural forfeit.

Of course, in this case, we must be sure that we are talking about two distinct waivers: the question of waiver of *Miranda* rights at the time of arrest; and the question of the waiver of the right that *Miranda* was designed to safeguard at time of trial.

The fundamental nature of the Fifth Amendment rights have been echoed over and over again for almost two hundred years. When an *inherently personal, fundamental right* of a defendant is at stake, it has been said that only a *personal waiver* of such a constitutional right can be binding and effective against a defendant, as a matter of federal constitutional law. *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir., 1973), citing

"Developments and The Law – Federal Habeas Corpus," 83 Harv. L.R. 1038, 111, n. 102 (1970).

In one of the principal cases cited by the Petitioner, *United States, ex rel. Allum v. Twomey*, 484 F.2d 470 (7th Cir., 1973), the Court cited the *Fay v. Noia* doctrine as it applied to *substantive personal rights*, and emphasized "the importance of the defendant's participation in the waiver decision . . . with respect to major decisions, such as the entry of a guilty plea, *the waiver of the privilege against self-incrimination*, or the decision not to appeal, which are appropriately made *only with a full understanding of the consequences*. . ." 484 F.2d at 744, n. 9 (Emphasis added). This opinion falls into a longstanding legal principle, that the attorney without *express* authority may not surrender or compromise substantive rights of a client and that any attempt to do so will not be reviewed in the courts. 7 Am. Jur. 2d *Attorneys at Law* Sec. 120-122 (1963).

The validity of a waiver of constitutional rights depends upon its meeting the test of having been *completely voluntary and knowingly and intelligently* made. *Miranda v. Arizona*, 374 U.S. at 379. Thus, the standard for waiving rights under Miranda should be as stringent in the courtroom to waive the defendant's right to object, i.e. it must be done with his personal consent, on the record, knowingly, intelligently, voluntarily and with a defendant being apprised of the consequences of such a waiver.

> In *Proctor v. United States*, 404 F.2d 819, the court said
>
> The *record* now before us *is inadequate* to support a finding of valid waiver under Miranda. *Since no Miranda objection was made at trial* – we notice the Miranda issue on appeal as a "defect affecting substantial rights. . .Hence we remand. . .for a hearing. . ."

There is nothing in the SYKES' trial record to show a finding of valid waiver of Miranda, and therefore, even though there was no objection as in the *Proctor* case, there should be a hearing on voluntariness of waiver.

Naturally, one of the premises of this case has to do with voluntariness. The validity of the waiver of the right to remain silent depends upon it being voluntarily, knowingly and intelligently made. *Franklin v. State*, Florida, 1975, 324 So.2d 187; *Nunez v. State*, 227 So.2d 324; *Stewart v. Stephens*, 244 F. Supp. 982 (1965). There are hundreds of cases on this point throughout the United States – federal and state – which stand for this premise.

"It has been pointed out that 'courts indulge every reasonable presumption against waiver of fundamental constitutional rights' and that we 'do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an *intelligent* relinquishment or abandonment of a *known* right or privilege.'" *Johnson v. Zerbst*, 304 U.S. 458

Now, then, the Petitioner contends that there was a deliberate bypass by SYKES precluding him from a *Jackson v. Denno* hearing. Nowhere in the record is there one iota of evidence of a bypass. The district court, in its written opinion, states in exceptional circumstances

> some strategic decision at trial can preclude an accused from later asserting a constitutional claim on federal habeas corpus. *Henry v. Mississippi*, 379 U.S. 443, 451-452, 85 S. Ct. 564, 569 (1965); *Fay v. Noia*, 372 U.S. 391, 439, 83 S. Ct. 822, 849 (1963); *Winters v. Cook*, 489 F.2d 174, 176-180 (5th Cir., 1973). Other than the *bold assertion*, however, Respondent has pointed to nothing *in the record* and has adduced no evidence here that would demonstrate the kind of *exceptional*

> *circumstances* recognized in the authorities as constituting a waiver. Clearly, therefore, it would be error for the Court to give effect to Respondent's contention *on this record.*

And then, the Fifth Circuit stated relating to bypass in the instant case that

> The failure to object in this case cannot be dismissed as a trial tactic, and thus, a deliberate bypass. Aside from the state's bare allegation that such was the case, without suggestion of the slightest tactical benefit, there is nothing here present upon which to speculate that the defendant's failure to object to the introduction of SYKES' statement was a strategic decision. We can find no possible advantage which the defense might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190(i).

Again, of course, it must be pointed out that the Florida Rule provides a responsibility not merely for the defendant's counsel but also for the Court – on its own motion – to protect the defendant's fundamental rights. Then, too, a proper predicate for the prosecutor to enter a confession or admission must be a showing of voluntariness.

A deliberate bypass of a fundamental right for tactical reasons which is made by counsel with the knowledge and consent of defendant and with the defendant being aware of the consequences of his waiver of a Fifth Amendment right would foreclose a *Jackson v. Denno* hearing.

However, failure to object by itself, does not constitute waiver of the right to a hearing on the voluntariness of a confession except in *certain circumstances* where a *deliberate bypass* of the right to question the voluntariness for trial tactics. *United States ex rel. Cruz v. LaVallee*, 448 F.2d 671 (2d Cir., 1971). The Court said that "*when the record* of the state trial

court *clearly and beyond doubt* shows a *deliberate bypass*," then a hearing in this case is totally void of a bypass and the federal district court and circuit court so held.

Also, in *Stewart v. Stephens*, 244 Fed. Supp. 982 (Arkansas, 1965), it was stated that an action in District Court for habeas corpus proceedings is not affected by procedural defaults incurred by the Petitioner during state court proceedings *except in rare instances* when he, *after consultation* with counsel or otherwise, has *understandingly* and *knowingly* bypassed the privilege of seeking to vindicate his federal claims in state courts.

In this case, the transcript of the trial raises the voluntariness question vividly and "flags" the question for the trial court's requirement of investigation into the issue before allowing entry of a confession or admission to the jury. Throughout the state's case at the trial, the matters of alcohol, whisky, intoxication and the defendant being so drunk that if he weren't arrested for murder, he would have been arrested for drunkenness, came into evidence. No voluntariness predicate was laid by the prosecutor and no voluntariness hearing was afforded the defendant! Surely, such testimony that the defendant may have been incompetent at the time that he made statements would "flag" the matter.

Testimony of drunkenness at the time of a confession certainly should "trigger" or "flag" the question of voluntariness. *Townsend v. Sain*, 372 U.S. 293 (1963). In 1964, the Florida Supreme Court in *Reddish v. State*, 167 So.2d 858, reversed a murder conviction for the reason that the confessions obtained from the defendant on the day he was in serious physical condition and had been given several doses of narcotics to relieve pain were not obtained in a manner

consistent with constitutional standards against compulsive self-incrimination and were inadmissible. The Court said that there was no clear-cut testimony regarding mental condition at the time he gave the statements. Based on this 1967 case, it would seem that when testimony started coming in regarding the drunken condition of SYKES that the trial judge, irrespective of his duty in the first place, would see the "flag," excuse the jury, require either the prosecutor to lay a proper predicate or inquire *on the record* whether or not the defendant was *deliberately bypassing* his fundamental right.

Subsequent to the reversal in the *Reddish* case, supra, the appellee requested, that the Supreme Court of Florida modify its original opinion by eliminating the following:

> It was the state's burden to prove that the confession was freely and voluntarily obtained.

It is so obvious what the Florida law is as respects this question that there should be no doubt as to the Florida procedure that *only* with a proper predicate by the prosecutor can a confession come in; and in reply to the request, in *Reddish* by the State to modify its opinion the Court specifically and unequivocably reinforced its previous holding and said

> (17) The holdings vary in different jurisdictions. Florida has long adhered to *the rule that preliminary to the introduction of an extrajudicial confession it is the state's burden to go forward with the evidence to establish its admissibility.* This includes the burden to make a prima facie showing that the confession was voluntarily given. *When the state has accomplished this, an accused who denies the voluntariness of the confession must then go forward with evidence to support his position. The trial judge then rules on the basis of*

all of the evidence. Davis v. State, 90 Fla. 317, 105 So. 843; *Nickels v. State*, 90 Fla. 659, 106 So. 479; *Cawthon v. State*, 118 Fla. 394, 159 So. 366; *Bates v. State*, 78 Fla. 672, 84 So. 373; *Welsh v. State*, 122 Fla. 83, 164 So. 835; *Whitten v. State*, 86 Fla 111, 97 So. 496; *Sims v. State*, 59 Fla. 38, 52 So. 198; *Louett v. State*, 152 Fla. 495, 12 So.2d 168.

The divergent rules of the various courts are revealed by the following: Wharton, Criminal Evidence, 12th Ed., Section 352; *Commonwealth v. Dascalakis*, 243 Mass. 519, 137 N.E. 879, 38 A.L.R. 113, and *McLemore v. State*, 181 Ga. 462, 182 S.E. 618, 102 A.L.R. 634.

The respondent does not otherwise question our original opinion. The petition for modification is, therefore, denied.

It is so ordered. (Emphasis added)

There was no waiver in the instant case which resulted in a deliberate bypass, and SYKES is entitled to a *Jackson v. Denno* hearing as was held by both the United States District Court for the Middle District of Florida and by the United States Court of Appeals for the Fifth Circuit.

SYNOPSIS OF ARGUMENT AS TO POINT II

A *Jackson v. Denno* hearing is mandated in this case since there was never a voluntariness hearing as regards SYKES' confession or admission. Counsel for the defendant, the prosecutor and the Court have a duty to guard our constitution and to prevent erosion of fundamental rights. The law in Florida provides this standard before a confession or admission can be entered for jury evaluation.

Here, with the testimony of drunkenness by the defendant, everyone should have been aware of the

great necessity to investigate the question of competency to waive any rights by SYKES.

There is not much to say about deliberate bypass because there was nothing in the record to establish this fact. As a result, there is no deliberate bypass, and therefore, no exception to the holding of *Jackson v. Denno.*

The question of the *Davis* rule is immaterial here since in *Davis* it was question challenging the grand jury composition and the court held that prejudice must be shown. However, in this case, the confession was presented to the trier of facts – the jury – and there was inherent prejudice which is protected by the Fifth Amendment. The *Davis* case, relied upon so heavily in the Amicus Curiae Brief, can certainly be distinguished and is inapplicable in the SYKES case presently before the Court.

CONCLUSION

For the reasons indicated in this brief, the Respondent respectfully requests that this Honorable Court uphold and affirm the opinion of the United States Court of Appeals for the Fifth Circuit which approved of the decision of the United States District Court for the Middle District of Florida.

Respectfully submitted,

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